

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

THE UNITED STATES for the use of)
GMW Fire Protection, Inc., an Alaska)
Corporation,)

Plaintiff,)

vs.)

KANAG'IQ CONSTRUCTION CO.,)
INC., an Alaska Corporation, and)
WESTERN SURETY COMPANY, a)
South Dakota Corporation,)

Defendants.)

Case No. A05-170 CI (TMB)

**REPLY TO GMW'S OPPOSITION TO DEFENDANTS' MOTION FOR JNOV
OR, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL**

Defendants KANAG'IQ CONSTRUCTION CO., INC. and WESTERN SURETY COMPANY, by and through their counsel, Eide & Gingras, P.C., reply to GMW's Opposition to their Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for a New Trial.

GMW begins its opposition by confusing the meaning of a general jury verdict. As a rule, a general jury verdict will be upheld only if there is substantial evidence to support each and every theory of liability submitted to the jury. Webb v. Sloan, 330 F.3d 1158, 1166 (9th Cir. 2003). GMW submitted two theories of liability to the jury: quantum meruit and contract modification. Following the rule above, the jury necessarily found support for both of GMW's theories of liability submitted to it. GMW, however,

1 summarily and incorrectly concludes that the jury found for GMW solely on the theory of
 2 contract modification. That is not what the general verdict form indicates. [Exhibit D]¹
 3 That is not what the rule regarding a general jury verdict states. Webb, 330 F.3d at 1166.
 4 Furthermore, contrary to GMW's assertion that it never claimed there was no contract
 5 after the first year, Glen Johnson testified at trial that there was only a contract in year
 6 one. See trial testimony of Glen Johnson on January 23, 2008.² The significance of the
 7 jury necessarily finding evidence to support each and every theory of liability that GMW
 8 submitted to it is discussed below.

10 **A. GMW Failed To Meet Its Burden Of Proof Regarding Liability On The Part**
 11 **Of Western Surety, Therefore Western Surety Is Entitled To Judgment As A**
 12 **Matter Of Law.**

13 In its Opposition, GMW fails to address the issue of its burden of proof with
 14 respect to any liability regarding Western Surety, which Defendants briefed in their
 15 underlying motion. [Motion pp. 3-7] To the contrary, GMW appears to believe it has no
 16 burden of proof with regard to the surety under the facts of this case. GMW is mistaken.

17 The payment bond, by its express terms, states that its obligation extends only to
 18 *authorized* modifications of the contract – and notice of *those* modifications to the surety
 19 are waived:

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 21 The above obligation is void if the Principal promptly makes
 22 payment to all persons having a direct relationship with the
 23 Principal or a subcontractor of the Principal for furnishing

24 ¹ Exhibit designations refer to exhibits attached to the underlying motion.

25 ² The date of this particular testimony is believed to be correct, but Defendants
 were unable to obtain a copy of the log notes from trial to confirm the date.

labor, material, or both in the prosecution of the work provided for in the contract identified above, and any *authorized* modifications of the contract that subsequently are made. Notice of *those* modifications to the Surety(ies) are waived.

[Exhibit A, p. 1 (emphasis added)] Assuming that this language references the prime contract, there is no evidence that modifications to the prime contract in the third year of the project (discussed below) were noticed to or authorized by the surety.³ The surety did not bind itself with respect to unauthorized modifications of the prime contract. *Id.* The surety did not waive its rights with respect to unauthorized modifications of the prime contract. *Id.*

As a general rule, a surety will be discharged where the bonded contract is materially altered or changed without the surety's knowledge or consent. United States on Behalf and for the Benefit of Army Athletic Ass'n v. Reliance Insurance Co., 799 F.2d 1382, 1385 (9th Cir. 1986). Western Surety acknowledges that the rule *automatically* absolving a surety from liability because of an alteration in the contract between the principal and the obligee without the surety's consent is not applicable to bonds under the Miller Act, where the surety has deliberately contracted for an uncertain obligation. American Auto Ins. Co. v. U.S., 269 F.2d 406, 409 (1st Cir. 1959) (citing United States Fidelity & Guaranty Co. v. U.S., 191 U.S. 416 (1903)). The uncertain obligation, however, is only with regard to subcontracts. *Id.* While the surety here

³ The "prime contract" refers to the contract between the government and Kanag'Iq. The "subcontract" refers to the contract between Kanag'Iq and GMW.

1 contracted for an uncertain obligation with regard to any subcontracts, the surety did not
2 contract for an uncertain obligation with regard to the prime contract. Western Surety
3 does not claim it entered into its obligation relying on the terms of the subcontract. See
4 Id. Rather, Western Surety entered into its obligation relying on the terms of the prime
5 contract. And the surety limited the uncertainty of its obligation by expressly reserving
6 its rights, in writing, with regard to unauthorized modifications of the contract.
7 Moreover, a surety's obligation under a Miller Act bond may be discharged by a
8 modification of the contract not within the scope of the original undertaking. United
9 States Fidelity, 191 U.S. at 426.

11 GMW argues that the general rule regarding discharge of the surety only applies to
12 alterations of the prime contract, citing a case from the second circuit for this proposition.
13 [See Cam-Ful Industries, Inc. v. Fidelity and Deposit Co. of Maryland, 922 F.2d 156 (2nd
14 Cir. 1991)] A subsequent case, however, explained that the dispute in Cam-Ful arose
15 because a subcontractor completed additional work (wood sheeting) that was not detailed
16 in its subcontract but was required under the prime contract – the reference to the prime
17 contract in Cam-Ful was fact-specific. See Steward Mach. Co., Inc. v. White Oak Corp.,
18 462 F. Supp. 2d 251, 274 (D.Conn. 2006). The dispute here did not arise because of
19 work required under the prime contract but not detailed in the subcontract.
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22 Assuming, however, that the Court adopts the position that the rule that discharges
23 a surety from its bond obligation (where the bonded contract is materially altered or
24 changed without the surety's knowledge or consent) only applies to alterations of the
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1 prime contract, the prime contract in this case was altered in the third year. Phil Young
2 and Steve Frere both testified at trial that in the third year of the prime contract when they
3 were not actually on the project, the prime contract did *not* operate as a unit-price
4 contract. See trial testimony of Steve Frere on January 23, 2008, and testimony of Phil
5 Young on January 24, 2008. To the extent the subcontract was modified by conduct
6 because it did not operate as a unit-price contract in the third year, the prime contract was
7 similarly modified by conduct because it also did not operate as a unit-price contract in
8 the third year. The conduct is the same with respect to both contracts in the third year.
9 Thus, contrary to GMW's assertion that the surety has shown no alteration to the prime
10 contract that would permit it to avoid liability, at trial the surety did show alteration to the
11 prime contract during the third year that would permit it to avoid liability.
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14 The surety does not argue here that it is *automatically* discharged from liability.
15 Rather, given the express language of the bond regarding unauthorized modifications and
16 reservation of rights, and GMW's arguments regarding waiver and modification, GMW
17 had the burden of proof with respect to liability on the part of the surety. See United
18 States v. Hal B. Hayes & Assoc., Inc., 221 F.Supp. 260, 263 (D.C.Cal. 1963). Having set
19 forth the affirmative pleas of waiver and ratification in its arguments and its jury
20 instructions, GMW had the burden of proving their applicability by a preponderance of
21 the evidence. Id.
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23 A finding of waiver or ratification on the part of the surety requires a showing of
24 the surety's: (1) actual knowledge of the modifications, and (2) consent to the
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1 modifications. United States on Behalf and for the Benefit of Army Athletic Ass'n v.
 2 Reliance Insurance Co., 799 F.2d 1382, 1387 (9th Cir. 1986). At trial, GMW failed to
 3 meet its burden of proof with regard to the surety: GMW did not show that the surety had
 4 knowledge of or consented to material modifications to the contract. Furthermore, such
 5 modifications to the prime contract were outside its scope, as the prime contract was
 6 written and extended by option as a unit-price contract. Absent a showing of the surety's
 7 knowledge of and consent to material modifications to the prime contract that were
 8 outside the scope of the prime contract, the surety neither waived nor ratified the
 9 modifications. Id. Moreover, Western Surety expressly reserved its rights with regard to
 10 unauthorized modifications of the prime contract. [Exhibit A]

12 To the extent a showing of prejudice or damage to the surety is required to
 13 discharge it, unauthorized modifications to the contracts through conduct in the third year
 14 were prejudicial to the rights that the surety expressly reserved in the payment bond
 15 regarding unauthorized modifications, and the damage is the judgment against it. See
 16 Reliance Insurance, 799 F.2d at 1385 (regarding a showing of prejudice or damage).
 17 As a matter of law, Western Surety should be discharged of any liability in this matter.

19 Even if Western Surety is not discharged of liability in this matter for the above
 20 reasons, the Ninth Circuit has consistently held that the measure of recovery against the
 21 surety is the bonded subcontract in a Miller Act case brought by a subcontractor. See
 22 Taylor Construction, Inc. v. ABT Service Corp., Inc., 163 F.3d 1119, 1122 (9th Cir.
 23 1998); United States for the Use and Benefit of Walton Techn., Inc. v. Weststar Eng'g.
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1 Inc., 290 F.3d 1199, 1207 (9th Cir. 2002). There was no bonded subcontract in the third
2 year of the project, the time period for which GMW seeks damages. With regard to
3 GMW's theory of quantum meruit, Defendants agree that a quantum meruit claim may be
4 brought under the Miller Act. See Central Steel Erection Co. v. Will, 304 F.2d 548 (9th
5 Cir. 1962) (case involved a claim for additional work). The case law, however, does not
6 involve a completely different type of implied modified contract (lump sum) or no
7 contract at all after year one, either of which results in no bonded subcontract in year
8 three. Id. Absent a bonded subcontract in year three, there can be no measure of
9 recovery against the surety for damages allegedly incurred in year three. With regard to
10 GMW's theory of modified contract, Defendants maintain that under Alaska law the
11 subcontract was not modified by conduct and no damages are owed to GMW. See
12 National Bank of Alaska v. J.B.L. & K. of Alaska, Inc., 546 P.2d 579, 581-582 (Alaska
13 1976). If the contracts were modified through conduct in the third year, however, there
14 was no bonded subcontract at that time against which to measure recovery. Instead, there
15 was a modified, unwritten, and unbonded subcontract in the third year that provides no
16 measure of recovery for the damages alleged by GMW during that time period.

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GMW introduced no evidence whatsoever at trial with regard to the issue of
liability on the part of the surety in the third year of the project. This is particularly
problematic in a situation involving alleged modifications through conduct to both
contracts in the third year that were not within the scope of the original contract and not
authorized by the surety, as required by the bond. Further, those modifications resulted

1 in no bonded subcontract in the third year against which to measure recovery for damages
 2 alleged by GMW during that time. GMW failed to meets its burden of proof regarding
 3 liability on the part of the surety under these facts. Therefore, Western Surety is entitled
 4 to judgment as a matter of law. In the alternative, Western Surety requests a new trial so
 5 it may be presented with any evidence against it and defend itself accordingly.

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 7 **B. Under Alaska Law No Contract Modification Occurred, Therefore Kanag'Iq
 Requests Judgment As A Matter Of Law.**

8 The substantive issue of contract modification is governed by state law. Walton
 9 Techn., 290 F.3d at 1204. Alaska law does not support GMW's argument that express
 10 contract language regarding modification and waiver may simply be disregarded in this
 11 case. To the contrary, while Alaska law provides that modification of a written contract
 12 may be effected through subsequent conduct or oral agreements, Alaska law does not
 13 provide that modification of a written contract may be effected through subsequent
 14 conduct when there is express contract language regarding modification and waiver. See
 15 Alaska Statebank v. Fairco, 674 P.2d 288, 292 (Alaska 1983) (did not involve express
 16 contract language regarding modification and waiver); Hendrickson v. Freericks, 620
 17 P.2d 205, 211 (Alaska 1981) (upholding non-waiver provisions in property contracts).
 18 Furthermore, Alaska law provides that when there is no written modification, no oral
 19 agreement to modify, and no showing of the required consideration given for the alleged
 20 change, the court will not infer a modification solely from the parties' conduct. National
 21 Bank of Alaska, 546 P.2d at 581-582. See also, Kincaid v. Kingham, 559 P.2d 1044,
 22 1046 n.6 (Alaska 1977) (adopting the above rule in National Bank of Alaska). There was
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1 no written modification in this case, there was no oral agreement to modify, and GMW
2 has not shown the required consideration given for the alleged change. Following these
3 Alaska cases, no modification took place.

4 GMW misconstrues the applicable state law on these facts and instead relies on a
5 treatise, case law from other states, and federal case law to support its position. Those
6 sources do not trump Alaska case law on a substantive question of law in this matter.
7 GMW does refer to an Alaska case involving a rental agreement and a non-waiver clause,
8 but the landlord in that case acquiesced for years with regard to late payment of rent,
9 which constituted a waiver of certain rights. Dillingham Commercial Co., Inc. v. Spears,
10 641 P.2d 1, 7-8 (Alaska 1982). In this case there was no long acquiescence on the part of
11 Kanag'Iq, which stopped payment to GMW as soon as it realized there was a problem.
12 Pursuant to the express language of the written subcontract and the law applicable to
13 these facts, Kanag'Iq respectfully requests judgment as a matter of law or, in the
14 alternative, a new trial on the grounds that the judgment is against the weight of the
15 evidence as discussed above.
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18 CONCLUSION

19 GMW failed to meet its burden of proof with regard to any liability on the part of
20 Western Surety in this matter. GMW presented no evidence whatsoever at trial with
21 respect to Western Surety. GMW failed to establish that the surety was notified of any
22 modifications to the prime contract or that it consented to those modifications.
23 Furthermore, Western Surety expressly reserved its rights with regard to unauthorized
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1 modifications of the contract. The alleged modifications of the prime contract and the
2 subcontract in the third year of the project prejudiced the surety's express rights under the
3 bond and resulted in damage to the surety in the form of the judgment against it.
4 In addition, there was no bonded subcontract in the third year of the project under a
5 theory of quantum meruit or under a theory of modified contract. As a result, there was
6 no bonded subcontract against which to measure recovery in the third year of the project
7 when GMW alleges damages.
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9 GMW also misconstrues Alaska case law on contract modification. While
10 Kanag'Iq maintains there was no modification through conduct in this case, if there was
11 such modification it took place with regard to both the prime contract and the subcontract
12 in the third year of the project. Phil Young and Steve Frere both testified that the prime
13 contract did *not* operate as a unit-price contract in the third year. To the extent such
14 conduct constitutes modification of the subcontract, it similarly constitutes modification
15 of the prime contract. GMW cannot have it both ways: either the prime contract and the
16 subcontract were not modified through conduct in the third year and GMW is owed no
17 damages, or the prime contract and the subcontract were modified through conduct in the
18 third year and GMW failed to meet its burden of proof with regard to any liability on the
19 part of the surety given the modifications. Following Alaska case law regarding contract
20 modification, Kanag'Iq and Western Surety have no liability in this matter. Even if the
21 prime contract and the subcontract were modified through conduct in the third year of the
22 project, Western Surety has no liability as a matter of law. Kanag'Iq and Western Surety
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1 respectfully and separately request judgment accordingly or, in the alternative, a new
2 trial.

3 DATED at Anchorage, Alaska this 27th day of February 2008.

4 EIDE & GINGRAS, P.C.
5 Attorneys for Defendants
6 Kanag'Iq Construction Co., Inc. and
7 Western Surety Company

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16 CERTIFICATE OF SERVICE

17 I am a legal secretary employed by the law
18 firm of Eide & Gingras, P.C. That on this
19 28th day of February 2008, I served

20 [x] Electronically

21 a true and accurate copy of the foregoing
22 document upon the following counsel of record:

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EIDE & GINGRAS, P.C.

By /s/Donna Charter

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